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NO. 92-1032

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

BENASA REALTY COMPANY, t/a Wild Acres t/a Wild Acres Country Club t/a Wild Acres, Inc.; BENASA HOLDINGS, INC.; WILD ACRES, INC., BENASA REALTY COMPANY, c/o First Eastern Bank, N.A.; BENASA INVESTMENTS, INC., c/o Corporation Guarantee and Trust Company; WILD ACRES COUNTRY CLUB, INC., and WILD ACRES LAKES PROPERTY & HOMEOWNERS ASSOCIATION,

Petitioners

v.

DENNIS MOONEY, MLA MANAGEMENT ASSOCIATES, INC. and MOUNTAIN LEISURE ASSOCIATES,

Respondents

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

BRIEF OF RESPONDENT DENNIS MOONEY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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16 pp

COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

Whether this Honorable Court should entertain a Petition for Writ of Certiorari which does nothing more than question a United States Court of Appeals' interpretation of state law in a diversity case on the issue of which party bears the burden of apportioning damages between two events causing injury.

Whether this Honorable Court should entertain a Petition for Writ of Certiorari to review the Court of Appeals' straightforward application of state law in a diversity case where Petitioner has embellished that simple issue with unseemly and uncalled-for attacks upon the Circuit panel and misleading characterizations as a gimmick for manufacturing frivolous seventh amendment issues and invoking this Court's supervisory powers.

Whether this Honorable Court should further entertain a Petition for Writ of Certiorari in this diversity case where the decision of the United States Court of Appeals is not final, but has only resulted in a remand for a partial new trial and for further proceedings on whether sanctions should be awarded to plaintiff as a result of false statements made at trial by counsel for Petitioner's co-defendant that three absent witnesses had been subpoenaed.

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CONSTITUTIONAL AND STATUTORY PROVISIONS

Contrary to petitioner's suggestion that the Seventh Amendment to the United States Constitution and Section 1652 of the United States Judicial Code, 28 U.S.C. §1652, are somehow implicated in the matter before the Court, this case involves neither provision for purposes of Rule 24.1(f) or any other purpose. Federal jurisdiction in this matter is based solely on diversity of citizenship pursuant to 28 U.S.C. §1332(a) and no federal question of any conceivable significance is presented.

COUNTERSTATEMENT OF THE CASE

Petitioner's Statement of the Case is no more than a collection of misstatements, inaccuracies and omissions and, as such, is useless to the Court in determining, to the limited degree necessary, the background of the case and the proffered basis for the extraordinary relief being sought.

This diversity case arose from a tragic swimming pool accident on July 12, 1987, at the Wild Acres Country Club, a resort community in the Pocono Mountains in Pennsylvania. Evidence offered at trial showed that on that date, the plaintiff, a twenty year old citizen of the State of New York, while visiting friends at Wild Acres, performed a horizontal, racing-style dive from a place on the pool deck where the depth was marked "four feet." In actuality the pool was only about three feet deep at that location.

As a result of his dive, the plaintiff struck his head on the bottom of the pool and received a fracture to his cervical spine. The plaintiff's evidence at trial showed that after being injured initially as a result of the dive itself, however, he was even more severely injured when the lifeguard on duty negligently brought about his removal from the pool without the use of an available spine board, a device whose very purpose is to help immobilize the victim of a fractured spine in order to help avoid permanent paralysis. In consequence of the injuries caused by the negligent removal of the plaintiff from the pool, the plaintiff has been rendered a quadriplegic for life.

The case was tried to a jury in the United States District Court for the Middle District of Pennsylvania, the Honorable Richard P. Conaboy, Chief Judge, presiding, beginning on November 19, 1990. The plaintiff contended at trial that the defendants were liable for his diving injuries because the pool was unsafe, negligently maintained, lacked necessary warnings against diving, and was dangerously mismarked as to actual depth of water at the point where the dive was attempted. The plaintiff also

separately raised another theory -- that after being injured from the dive the plaintiff was even more severely injured as a result of the lifeguard's negligence in removing him from the pool in a manner contrary to accepted safety standards.

The plaintiff's medical expert, Richard H. Kaplan, M. D., testified at trial that it was his opinion to a reasonable degree of medical certainty that the improper rescue turned an "incomplete spinal injury," from which the plaintiff might have recovered significant use of his arms and legs, into a "complete spinal injury," that is, irreversible quadriplegia. (Petitioner's Appendix at 117-18) Dr. Kaplan clearly differentiated that latter injury from the incomplete spinal injury initially caused by the dive, explaining that an incomplete spinal injury is one in which the victim recovers the use of his arms and legs after a transitional period of paralysis, though not to such a degree that the injury itself is cured. (Petitioner's Appendix at 115-16) Dr. Kaplan also testified, once again to a reasonable medical certainty, that the failure to use the spine board in pulling the plaintiff from the pool was indeed a significant factor in increasing the injury from the status of "incomplete" category to the status of "complete." (Petitioner's Appendix at 117-18)

Elsewhere in Dr. Kaplan's extensive testimony (Petitioner's Appendix at 92-214) he delineated specific quantitative differences in medical costs between the complete injury the plaintiff suffered and the incomplete injury he would have suffered if he had been safely removed from the pool. Taking the future medical expenses for the plaintiff's quadriplegia, he subtracted item by item the costs which the plaintiff would have had if his injury had remained "incomplete." (See Petitioner's Appendix at 160-63) This evidence thus distinguished in the most specific terms between the damages caused initially by the dive and those caused by the improper removal from the pool.

For their part, the Petitioner-defendant responded with expert

medical testimony which did not even address the harm caused by the negligent rescue, but merely asserted that a spinal fracture occurred as a result of the dive. This point was not disputed. A co-defendant, who has not petitioned this Court, provided non-medical expert testimony that the dive itself produced an irreversible injury which alone was responsible for the plaintiff's permanent quadriplegia. This testimony was offered to imply that the process of removing the plaintiff from the pool without a spine board caused no additional harm. The expert, however, was not accepted by the district court as a qualified medical expert.

Defendants argued after the close of evidence at trial that the plaintiff's claim for the aggravation of his injuries by the negligent rescue procedures should be dismissed, not because such a claim had never been raised but because the plaintiff allegedly had failed to meet his supposed burden under Pennsylvania law to "apportion" harm between the initial diving injury and the damage caused in removing the plaintiff from the pool. Notwithstanding the plaintiff's expert medical proof that his "complete spinal injury" was a result of his removal from the pool rather than the dive, the district court adopted the defendants' position in interpreting Pennsylvania law and submitted to the jury, over the plaintiff's protest, a single theory of negligence requiring the plaintiff to prove that the defendants were liable for the original dive itself.

The district court specifically refused plaintiff's proposed jury interrogatories and proposed points for charge, each of which would have informed to the jury that the plaintiff's claim for harm caused by the defendants' negligent rescue after the plaintiff was rendered helpless was not subject to the defense of assumption of the risk. (See Petitioner's Appendix at 65-69)

On November 29, 1990, the jury determined in answer to special interrogatories that, by virtue of his act of diving into the pool, the plaintiff had "assumed the risk." Pursuant to the interrogatories and instructions of

the court, the jury thereby extinguished all avenues of recovery, even recovery for the injuries caused after the dive by the negligent removal of the plaintiff from the pool. A verdict and judgment were thereupon entered in favor of defendants and against the plaintiff. Upon consideration of the plaintiff's post-trial motion, the district court declined to award a new trial, citing specifically its belief that Pennsylvania law had placed upon the plaintiff the burden to apportion the harm caused by the negligent rescue or else suffer loss of that separate claim. (Petitioner's Appendix at 68-69)

The plaintiff appealed to the United States Court of Appeals for the Third Circuit, which, after briefing, extended oral argument and full supplemental briefing on the issue of apportionment, affirmed in part and in part remanded for a new trial. The court of appeals, in interpreting Pennsylvania law, held that the plaintiff's evidence was sufficient to raise a jury question as to whether the alleged negligent rescue had caused the plaintiff's injury. The court of appeals recognized that the jury had never had any opportunity to address this all-important claim.[1]

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[1] The retrial has been scheduled for March 1993; petitioner's petition to the Third Circuit for a stay of remand of the record has been denied.

SUMMARY OF ARGUMENT

This Honorable Court should now decline to grant the Petition for Writ of Certiorari because the issue of state law upon which the court of appeals' decision was clearly and correctly based raises no issue whatsoever concerning federal law. Petitioner has leveled false and unseemly accusations of impropriety against the court in order to manufacture a pretense for the exercise of this Court's certiorari jurisdiction. Petitioner has misstated the theory of the plaintiff's case, the evidence considered by the jury in reaching its verdict, the findings of fact made by the jury, and the controlling state law principles, all in an effort to make this Court believe that a correct decision of state law in a diversity case is somehow a matter requiring the Court's attention. In the final analysis Petitioner's hyperbole and departure from the true record only reveal Petitioner's true desire to escape the risk that a jury, upon considering the plaintiff's negligent rescue claim for the first time, may award money damages to the plaintiff.

The court of appeals properly exercised its appellate jurisdiction, properly reviewed the evidence and correctly applied state law in determining that the plaintiff was entitled to a new trial limited to the issue of "negligent rescue." The court of appeals rightly held that the district court's erroneous formulation of special jury interrogatories had foreclosed any consideration of that theory by the jury.

ARGUMENT

Petitioner posits numerous "questions presented for review" which challenge the judicial integrity of the three-judge panel of the United States Court of Appeals for the Third Circuit in rendering its unanimous decision in this matter -- a decision which the court en banc declined to rehear. In this respect, Petitioner sacrifices the respect owed to that court in the hope of avoiding a jury trial.

Petitioner would have this Court believe that the court of appeals deliberately created its own version of the evidence and invented its own body of law, thereby so far departing from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision. It is, however, petitioner who has been "inventive" in an effort to create the appearance of irregularity where absolutely none can be found, as the true record so amply demonstrates.

Petitioner's entire argument is based upon two related false premises designed to muddy the clearest waters. These premises are: (1) that the theory of the plaintiff's whole case was "injury on rescue not on dive"; and (2) that the jury considered and rejected the plaintiff's negligent rescue claim unencumbered by any ruling or restriction of the district court, and that the jury made a "finding" that the plaintiff sustained his injuries solely during his dive when his head struck the bottom of the pool rather than during the subsequent rescue. Considering that the district court itself, in its Opinion denying the plaintiff's motion for new trial, acknowledged that the negligent rescue theory was withheld from the jury as a separate claim based on an interpretation of the Pennsylvania law on apportionment, Petitioner's argument is at best untrustworthy.

It is solely upon these distortions that petitioner rests its argument that the court of appeals "negated" the jury's verdict in remanding for a retrial on the negligent rescue claim.

As explained above in respondent's Counterstatement of the Case, the plaintiff's claims were twofold. As the court of appeals correctly stated in its opinion:

> Mooney proceeded at trial on two theories. First, he maintained that the defendants were negligent in failing to provide adequate warning about the depth of the pool area into which he dove. Second, he contended that the incomplete spinal injury that he suffered as a result of the dive became a complete spinal injury when a lifeguard negligently removed him from the pool without using an available spine board.
>
> (Petitioner's Appendix at 3-4)

The jury, moreover, was not permitted to consider the plaintiff's negligent rescue claim independently of the claim for injury caused by the dive itself, and therefore free of the defense that the plaintiff had assumed the risk of diving. As the district court itself acknowledged in its Opinion:

> Mooney suffered his initial injury when he dove into the pool. However, Mooney maintains that his negligent removal from the pool aggravated this initial injury, thereby providing a separate and distinct ground for recovery. Mooney maintains the Court erred in failing to charge the jury that assumption of the risk could not shield the defendants from liability for the negligent removal from the pool.
>
> . . . . We concluded that there was insufficient evidence from which the jury could reasonably apportion the harm. Accordingly, the requested instruction was not given. This decision is consistent with Pennsylvania case

law. See: Martin v. Owens-Corning, 528 A.2d 947: (Where the causes of harm do not lend themselves to separation on any reasonable basis, apportionment by the jury was the result of conjecture and improper.)

. . . .

Applying this standard to the present case, we conclude the record before the court lacked any evidence which would provide a "reasonable basis" for apportioning harm between the initial dive and subsequent rescue. Accordingly, the requested instruction was properly denied.

(Petitioner's Appendix at 65-67, 69)

The court of appeals quite accurately states in its opinion that

[t]he district court declined to permit the jury to consider the negligent rescue claim separately from the issue of liability resulting from the dive because, the court held, the plaintiff had failed to adduce sufficient evidence to differentiate or 'apportion' liability between the two claims. The court therefore submitted the case to the jury on a unitary negligence theory with a set of special interrogatories."

(Petitioner's Appendix at 4)

Directly contrary to petitioner's contention that the district court's special jury interrogatories "put plaintiff's negligent rescue claim to the jury in a reasonable and responsible fashion [,]" the negligent rescue claim was never separately presented to the jury. The court of appeals correctly

discerned in its review of the record that "[b]ecause of the manner in which the case was submitted to the jury, when the jury affirmatively answered the interrogatory regarding assumption of risk, its answer completely interred plaintiff's case. The jury should, however, have been able to consider separately the question whether there was a negligent rescue, the risk of which the plaintiff did not assume." (Petitioner's Appendix at 24-25)

Neither did the court of appeals, as petitioner so boldly suggests, base its conclusion on "invented" testimony not provided by the plaintiff's expert. The record clearly supports the court of appeals' recognition that Dr. Kaplan testified as to his opinion that plaintiff suffered two distinct injuries, a compression injury resulting from the impact of the initial dive, and a flexion injury, resulting from the manner in which plaintiff was rescued. In fact, even petitioner quotes Dr. Kaplan's clear testimony to the effect that failure to use a spine board was indeed a significant factor in causing a complete spinal injury. (Petitioner's Petition at 30)

Contrary to petitioner's distracting and intemperate accusations, the court of appeals did not formulate any legal principles contrary to those established by controlling law, nor did it "invent its own law." The court of appeals simply applied settled Pennsylvania law. The "burden of proof" referred to in Martin v. Owens Corning Fiberglas Corp., 515 Pa. 377, 528 A.2d 947 (1987), and other cases cited by petitioner, is merely the burden of showing that there were, in fact, two injury-producing events. The plaintiff more than satisfied this burden through the expert testimony of Dr. Kaplan that the failure to use a spine board in removing the plaintiff from the pool caused his spinal injury to become "complete," i.e., permanent. The plaintiff never had a burden also to show exactly which among his injuries was caused by the negligent rescue, as distinct from the dive. That is a burden which falls upon the defense. Indeed, in Martin v. Owens-Corning Fiberglas Corporation, supra, 515 Pa. at 381-82, 528 A.2d at 949, the Pennsylvania Supreme Court refused to allow a jury

even to consider reducing an award of damages by apportioning harm between two causes for lung disease -- smoking and asbestos -- where the defendant failed to provide evidence to support such a differentiation.

The court of appeals did not "invent" that proposition but rather correctly stated as a matter of Pennsylvania law which the district court had misapprehended. The court of appeals properly relied on Restatement (Second) of Torts, §433(B)(2) (1965), noting that the Pennsylvania Supreme Court adhered to the Restatement position on apportionment in Martin. (Petitioner's Appendix at 23 and n.5)

Neither did the court of appeals "invent its own law" in declining to follow Huddell v. Levin, 537 F.2d 726 (3d Cir. 1976), a "crashworthiness" products case that turned on New Jersey law and hence was inappropriate in this case to which Pennsylvania law applied.

Finally, the court of appeals panel did not, as petitioner disingenuously suggests, ignore the Third Circuit's decision in Borman v. Raymark Industries, Inc., 960 F.2d 327 (3d Cir. 1992). While the Borman decision, filed one day prior to oral argument in this case, is not mentioned in the court of appeals' opinion, petitioner neglects to point out that the Clerk of the court of appeals specifically required the parties to submit supplemental briefs addressing the effect, if any, of that decision on the issue of apportionment in this case. The Borman case, moreover, merely applied Martin v. Owens-Corning Fiberglas Corporation, supra, a Pennsylvania decision which the court of appeals explored in depth and unquestionably followed in this case.

It is respectfully submitted that it is not now the duty of this Honorable Court to rewrite Pennsylvania law through the vehicle of exercising supervisory power over the court of appeals as requested by Petitioner.

CONCLUSION

WHEREFORE, for all of the above reasons Respondent Dennis Mooney respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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